No. 15964

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAN O. HOYE, as Controller of the City of Los Angeles and DAN O. HOYE,

Appellants,

vs.

UNITED STATES OF AMERICA and ROBERT A. RIDDELL, Director of Internal Revenue,

Appellees.

BRIEF OF APPELLANT.

ROGER ARNEBERGH,
City Attorney,
BOURKE JONES,
Assistant City Attorney,
ALFRED E. ROGERS,
Assistant City Attorney,
T. PAUL MOODY,
Deputy City Attorney,
RALPH J. EUBANK,
Deputy City Attorney,
400 City Hall,
Los Angels 12, California,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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BRIEF OF APPELLANT.

Statement of the Pleadings and Facts.

The appellant and plaintiff below, Dan O. Hoye, is the Controller of the City of Los Angeles. [Tr. p. 3.] In such capacity, *inter alia,* he is charged by the laws of the State of California with disbursing the wages of employees of the City in a prescribed manner. [Tr. pp. 5-6.] (The applicable California laws are set forth in the Appendix hereto.)

On March 19, 1957, the City of Los Angeles was indebted to Richard A. Westberg, an employee of that city, in the sum of $158.78 for wages then due and owing but unpaid. [Tr. p. 4.]

On the same date appellee and defendant below, Robert A. Riddell, who is the Director of Internal Revenue for

the Sixth District, California, served upon Hoye a "Notice of Levy" pursuant to Section 6321 of the Internal Revenue Code of 1954. [Tr. pp. 4 and 8.] The said levy claimed the sum of $155.93 to be then due, owing and unpaid from Westberg to the United States for Internal Revenue taxes for the year 1955. [Tr. p. 7.]

On June 25, 1957, the District Director further served upon Hoye a "Final Demand" requiring the payment of the aforesaid amount and giving notice that failure to comply would result in enforcement proceedings being initiated pursuant to Section 6332 of the Internal Revenue Code. [Tr. pp. 9-11.]

Thereafter, on September 10, 1957, Hoye filed in the United States District Court for the Southern District of California, Central Division, a complaint denominated as a "Complaint to Quash a Notice of Levy and Final Demand Served on a Municipal Corporation by the Director of Internal Revenue" which named as defendants the United States of America, Riddell and Westberg. [Tr. p. 3.] Westberg was never served and did not otherwise appear in the action.

The gist of this pleading was that Hoye claimed no interest in the sum owing to Westberg other than for the purpose of paying the money to the proper parties legally entitled thereto, so that he would be discharged from his liability as custodian of the money and discharged from his duty as a public official to pay out only to the proper party. [Tr. p. 6.] Hoye asked that the District Court quash the notice of levy and final demand and that it determine that he was bound to pay the money over to the Director only in accordance with California law which would exempt him from personal liability. He

further asked for "such other and further order as the court deems just in the premises." [Tr. p. 6.]

On November 12, 1957, the United States filed a "Notice of Motion to Intervene and Motion to Intervene of the United States of America" [Tr. p. 12], a "Complaint in Intervention for Penalty Under Section 6332(b) of the 1954 Internal Revenue Code" [Tr. p. 14] and a "Notice of Motion to Dismiss and Motion to Dismiss and Supporting Memorandum." [Tr. p. 18.]

Following a hearing on these separate motions, the District Court on February 6, 1958, signed an order permitting intervention by the United States [Tr. p. 20], and entered in the minutes an order granting defendants motion to dismiss and directing defendants to prepare a formal order thereon. [Tr. p. 21.]

Thereafter, the government filed an amended complaint in intervention for penalty and for foreclosure for internal revenue tax lien against personal property. [Tr. p. 22.]

On March 10, 1958, the District Court then signed a formal order granting the government's motion to dismiss which provided as follows:

> "Good Cause Appearing Therefor, it is hereby ordered that the complaint in the above-entitled action may be, and it hereby is, dismissed for lack of jurisdiction of the subject matter and for lack of jurisdiction over the defendants, United States of America and Robert A. Riddell; however, this is not a final order under Fed. R. Civ. P. 54(b), since the United States of America has filed its Complaint in Intervention." [Tr. p. 27.]

On the same date notice of the granting of the motion to dismiss was given and on March 14, 1958, Hoye filed a notice of appeal from the order granting the motion to dismiss. [Tr. p. 28.]

Basis of Jurisdiction of the United States District Court.

The United States District Court for the district wherein funds are situated and levied upon pursuant to Section 6321 of the Internal Revenue Code has jurisdiction in disputes similar to, if not identical to that alleged in Hoye's complaint by virtue of the following statutes:

(1) 28 U. S. C. A., Section 2463, which provides:

> "All property taken or detained under any revenue law of the United States shall not be reprievable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

Property against which a warrant of distraint has been issued for a husband's income taxes, is "property taken or detained" within the meaning of this statute *Rothensies v. Ullman,* 110 F. 2d 590, and in addition to that case, as discussed hereafter, jurisdiction has been assumed in the following comparable cases: *Raffaele v. Granger,* 196 F. 2d 620; *Seattle Ass'n of Credit Men v. United States,* 240 F. 2d 906; *Lavino v. Jamison,* 230 F. 2d 909; *Gerth v. United States,* 132 Fed. Supp. 894; *Brinker Supply Co. v. Dougherty,* 134 Fed. Supp. 384.

(2) 28 U. S. C. A., Section 2201, which provides:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading may declare the rights and

other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

The theory of the application of this jurisdictional statute, as hereafter discussed, is that where, as here, a party other than the taxpayer is the person concerned in the controversy, the case is not one "with respect to Federal taxes."

Basis of Jurisdiction of the United States Court of Appeals.

The basis for the jurisdiction of this Court is found in 28 U. S. C. A., Section 1291, which provides:

> "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

The order which is claimed to be the final decision of the district court herein provides, in part, that the complaint

> ". . . may be, and it hereby is, dismissed for lack of jurisdiction of the subject matter and for lack of jurisdiction over the defendants, United States of America and Robert A. Riddell; . . ." [Tr. p. 27.]

Statement of the Case.

This case presents a situation instituted by a District Director of Internal Revenue wherein a municipal officer charged with the disbursement of public funds of the municipality is faced with a series of alternatives each of which may be conclusive against him whichever he chooses. Specifically, the two dilemmas presented involve a municipal controller in a community property state having under his control unpaid wages of a married municipal employee which wages have been subjected to distraint proceedings by a District Director of Internal Revenue for unpaid income taxes owed by the employee to the United States.

Each of the dilemmas faced by the controller is based upon his inability to absolve himself from personal liability by acceding to the District Director's demand that the employee's wages be paid over.

The first dilemma arises from the fact that the controller of the City of Los Angeles may disburse wages owing to a city employee only to such employee in accordance with the provisions of the Charter of the city or in accordance with Section 710 of the California Code of Civil Procedure which permits the garnishment of such wages by the usual judicial proceedings characterizing such action. (See Appendix.) To deal with such wages in any other manner subjects the controller to personal liability for the amounts involved as well as possible criimnal liability for malfeasance in office. The federal statutes relating to distraint proceedings by the Director of Internal Revenue for unpaid taxes do not provide that the person levied upon is to be exempt from personal liability upon turning over the property levied

upon, although the government contends that the legal effect of such action would be to exonerate the holder. However, the controller here, does not choose to gamble upon the correctness of some third person's view of the law.

A second and equally compelling dilemma faced by the municipal controller arises from the fact that under the community property laws of the State of California he has no absolute assurance that a married municipal employee necessarily has any property interest in wages due and owing to such employee. While it is generally true in California that the wages of a husband are community funds and that such funds would be liable for a debt such as unpaid income taxes of the husband or of the community, it is well established law in California that community property may be transmuted to other forms of property by either a written or oral agreement between the spouses. Consequently, a pre-existing agreement between such employee and his wife to the effect that all or a portion of his wages were to constitute the wife's separate property would effectively vest in the wife exclusive ownership as to such funds which would not then be subject to the payment of either the husband's or the community's debt to the United States for federal income taxes.

In view of these perplexing alternatives, the controller here in his complaint, in effect, asked the district court to determine who was the proper party to whom payment should be made so as to exonerate himself from all personal liability. The district court instead of entertaining his action dismissed it, and permitted the government to proceed in a punitory action against the controller

both in his official and individual capacities for failure to turn over such funds to the Director.

The question presented for determination may be stated as follows:

Where a director of internal revenue issues a warrant of distraint pursuant to Section 6321 of the Internal Revenue Code against wages due and owing to a married municipal employee which wages are in the custody of the controller of such municipality, does the federal district court have jurisdiction upon application of the controller to determine (1) the proper party to whom such funds should be paid so as to absolve the controller from liability for such payment, and (2) the nature and extent of the employee's interest in such wages where the property laws of the State are such that such wages may in whole or in part be the property of the employee's spouse?

Specification of Errors.

The appellant Hoye contends that the District Court erred: (1) in dismissing his complaint on the purported grounds of lack of jurisdiction over the subject matter and for lack of jurisdiction over the persons of the defendants; and

(2) in characterizing its order of dismissal as not being a final order because the United States had filed its complaint in intervention.

ARGUMENT.

POINT I.

The Order Granting the Motion of the United States to Dismiss the Complaint Is a Final and Appealable Order.

The District Court stated on the face of its order to dismiss that ". . . this is not a final order under Fed. Rules Civ. Proc. 54(b), since the United States of America has filed its Complaint in Intervention, . . ." This statement, however, does not fix the character of the order or establish its legal effect. As held in *Audi-Vision Inc. v. RCA Mfg. Co.,* 136 F. 2d 621, 623, and similar cases, the question whether a decree or order is final and appealable is not determined by the name by which the lower court gives it, but is to be decided by the appellate court on consideration of the essence of what is done by the decree. Such consideration here compels the conclusion that the order appealed from is final. The wording of the order is clear and unambiguous. It emphatically and definitely states that Hoye's complaint was, and is thereby, completely and absolutely dismissed. The essential issue raised in that action, *i. e.,* a determination as to the proper party to whom payment of the funds levied upon should be made, is not presented by the government's suit in intervention. Hence, the realities of the situation effectively overcome the District Court's claim that the order is not final.

The applicable rule is well stated in the case of *Thompson v. Murphy,* 93 F. 2d 38, where it is said:

> "An order, judgment, or decree, which leaves the rights of the parties to the suit affected by it undeterminable—one which does not substantially and completely determine the rights of the parties affected

by it in that suit—is not reviewable here until a final decision is rendered, nor is an order retaining or dismissing parties defendant, who are charged to be jointly liable to the complainant in the suit appealable. (Cases cited) But a final decision which completely determines the rights, in the suit in which it is rendered, of some of the parties who are not claimed to be jointly liable with those against whom the suit is retained, and a final decision which completely determines a collateral matter distinct from the general subject of litigation, and finally settles that controversy, is subject to review in this court by appeal or writ of error."

The foregoing rule has been adhered to in the following cases:

Rust v. United Water Works, 70 Fed. 129, 132; *Bankers Trust Co. v. T. K. Railway,* 251 Fed. 789, 797; *Rector v. United States,* 20 F. 2d 845, 860-872; *Curtis v. Connly* (C. C. A. 1), 264 Fed. 650, affirmed, 257 U. S. 260, 42 S. Ct. 100, 66 L. Ed. 222; *Sheppy v. Stevens* (C. C. A. 2), 200 Fed. 946, 947, 948; *Jackson v. Jackson* (C. C. A. 4), 175 Fed. 710, 715; *Great Lakes Towing Company v. St. Joseph Chicago S.S. Co.* (C. C. A. 7), 253 Fed. 635; *Siegmund v. General Commodities Corp.* (C. C. A. 9, 1949), 175 F. 2d 952; *Bradshaw v. Miner's Bank* (7 Cir.), 81 Fed. 902; *Hooven, Owens and Rentschler Co. v. John Featherstones' Sons* (C. C. A. 8, 1901), 111 Fed. 81; *Heikkinen v. United States,* 208 F. 2d 738, 740, 741; *Swift & Co. v. Compania Colombiana* (1949), 339 U. S. 684, 70 S. Ct. 861, 94 L. Ed. 1206-1210; *Cohen v. Industrial Loan Corp.,* 337 U. S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528.

The two cases last cited were commented upon in *United States v. Cefaratti,* 202 F. 2d 13, at page 16, as follows:

> "We understand the Cohen and Swift cases to establish this principle. An order that does not 'terminate an action' but is, on the contrary, made in the course of an action, has the finality that Section 1291 requires for appeal if (1) it has 'a final and irreparable effect on the rights of the parties' being 'a final disposition of a claimed right;' (2) it is 'too important to be denied review;' and (3) the claimed right 'is not an ingredient of the cause of action and does not require consideration with it."

The government's action in intervention as to Hoye, which is based solely upon Section 6332(b) of the Internal Revenue Code, presents only the question as to whether Hoye in his own person and estate is to be held liable for the sum levied upon together with costs and interest on such sum at the rate of 6 per centum per annum from the date of levy. Consequently, the order dismissing his action is just as final and conclusive as though no action in intervention had been filed, and therefore is appealable.

POINT II.

The District Court Has Jurisdiction Under the Provisions of 28 U. S. C. A. 2201 to Declare the Rights and Other Legal Relations Sought by the Appellant's Action.

The Declaratory Judgments Act has been held applicable to cases comparable to that presented by Hoye's complaint in at least two previous cases.

The case of *Tomlinson v. Smith* (C. C. A. 7, 1942), 128 F. 2d 808, was an action by Tomlinson against Smith as Collector of Internal Revenue for the District of Indiana to restrain the defendant from issuing or serving a warrant of notice of distraint in connection with the attempted collection of certain taxes, and for a Declaratory Judgment. From an order granting an interlocutory injunction, the defendant appealed. The complaint sought to prevent the Collector of Internal Revenue from issuing or serving any warrant or notice of distraint upon any of the customers of the Plymouth Manufacturing Co., or upon any person, firm or corporation under said company, or the plaintiff in his capacity as trustee in possession of the business property and choses in action of said company. The defendant contended that the proceeding was one to enjoin the collection of federal taxes and therefore prohibited by Section 3653, Title 26, U. S. C. A., Internal Revenue Code, which provides in part that:

> ". . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

The defendant further contended that the court was without jurisdiction to declare the rights of the parties because Title 28, U. S. C. A., Section 400 (now, 28 U. S. C. A., Sec. 2201) excepts therefrom controversies

as to federal taxes and it was upon this basis that the defendant by its Motion to Dismiss attacked the jurisdiction of the court to grant the relief sought.

The facts of said case, briefly stated, indicated that the Plymouth Manufacturing Co., on October 10, 1938, entered into a lease with Walfarth, Warren, Thompson and Tanner, as lessees of certain real and personal property. On October 22, 1938, said lessees entered into a partnership agreement with some 78 other persons, all of whom appear to have been former employees of the corporation. The lessees were designated as constituting the Board of Controls for the partnership and on October 22, 1938, the Plymouth Manufacturing Co., took charge and control of the property described in the lease and proceeded to operate the enterprise. The Plymouth Manufacturing Co., paid to the United States all Social Security, excises and other levies up to January 1, 1939. The partnership borrowed funds from the State Exchange Bank of Culver, Indiana, and to secure such loans in 1939 it executed a chattel mortgage which included accounts receivable from customers of the enterprise. By July 15, 1941, this mortgage was security for obligations in the amount of $65,160.12. On this date a contract was made between the partnership and the mortgagees by which the latter took possession of the business to supervise financial affairs. About March 1940 the Commissioner of Internal Revenue inaugurated a course of investigation to determine the liability of said partnership for social security taxes, and on November 20, 1940, the Commissioner ruled all the partners were employees except Walfarth, Warren, Tanner and Thompson, the lessees, and the Commissioner levied social security taxes aggregating $8000.00, together with penalties and interest

upon said four partners. The complaint alleges plaintiff was designated as trustee by the mortgagees for the purpose of protecting the rights of customers and especially the mortgagees and in such capacity he was authorized to collect from the customers of the enterprise and apply such collection upon the debt owing the mortgagees.

The complaint further alleges that the Collector of Internal Revenue persistently annoyed, harassed, and threatened the business activities of the enterprise and on August 22, 1941, said Collector dispatched to all of the largest debtors a "Final Notice and Demand" requiring each of them to pay to the Collector any moneys owing by them to the partnership. Thereupon the debtors refused to pay their obligations to the plaintiff.

The court held (p. 810) that the defendant concedes there are exceptional and extraordinary circumstances which will remove a case from the inhibition of the statute. Defendant argues that no such circumstances exist in the instant matter. The court doubted validity of such contention and declared it to be more important that plaintiff is not the alleged tax debtor; that he sues in the capacity of a trustee for the purpose of protecting the mortgage lien of property which defendant is seeking to distrain in satisfaction of taxes claimed to be owing by the partnership. (P. 811.)

The court cites the case of *Long v. Rasmussen,* Collector (D. C.), 281 Fed. 236, that a court in construing the revenue provision in question properly makes a distinction between suits instituted by taxpayers and non-taxpayers. The court held the former are within the scope of the inhibition, but the latter non-taxpayers are not. (To the same effect see *Rothensies v. Ullman* (3 Cir.), 110 F. 2d 590, 592.)

The court pointed out that the restraining order did not interfere with the right of the defendant to proceed against the taxpayer, or the one from whom the tax is alleged to be due. The court further held that the language of the statute which excepts federal taxes from the Declaratory Judgments Act is co-extensive with that which precludes the maintenance of a suit for the purpose of restraining the assessment or collecting of a tax when it applies to a suit by a taxpayer, but not to a suit by a third party seeking to protect a lien claimed to be superior to that of the Tax Collector as in the instant case. The court held that the District Court had jurisdiction to enter a Declaratory Judgment.

The case of *Hoye, Controller v. United States* (S. D. Cal., 1953), 109 Fed. Supp. 685, came before the District Court on a Motion of the United States of America and Robert A. Riddell, as Collector of Internal Revenue, to dismiss the complaint of the plaintiff who as City Controller of the City of Los Angeles is charged with the duty of paying salaries and pensions of the employees of said city. The defendant Champion according to the complaint was entitled to the sum of $185.85, as an employee or pensioner. The collector filed Final Notice and Demand and Levy upon the Controller for the sum of $121.71, as money due the United States from the defendant Champion. The complaint sought declaratory relief under the terms of the Declaratory Judgments Act, 28 U. S. C., Section 2201.

The United States and Riddell contended that the phrase "except with respect to Federal taxes," contained in Section 2201, and the provision in 26 U. S. C., Section 3653(a), which provides so far as material to said action that ". . . no suit for the purpose of restrain-

ing the assessment or any tax shall be maintained in any court . . .", deprives said court of jurisdiction either to give a declaratory judgment or to issue an injunction. The court (p. 686) pointed out that the contentions of the government were considered in the case of *Tomlinson v. Smith,* hereinabove cited, and the court therein distinguished between suits instituted by taxpayers and nontaxpayers, and held that the taxpayer was within the scope of the inhibition of the Declaratory Judgments Act. The court then held

> "While in that case the court pointed out that under the allegations of the complaint the third party claimed a prior lien, nevertheless, the situation is analogous to the instant case when the City of Los Angeles merely holds as a trustee the money which is due to the defendant taxpayer, Champion. Furthermore, under the law of the State of California, Sec. 710, Cal. C. C. P., the plaintiff Hoye as City Controller cannot pay money owed by the City of Los Angeles to anyone other than the one to whom the money is due unless and until there is filed with him an authenticated abstract of judgment of a court showing that the person is entitled thereto. If the plaintiff, Hoye, recognized the Demand and Levy by the Collector and paid the sum of $121.71, therein demanded, the plaintiff, Hoye, would still be liable to pay that same amount to Champion under the terms of Section 710, of the California Code of Civil Procedure. Thus the unusual circumstances referred to in Tomlinson v. Smith, supra, exist in this case and the defendant's Motion to Dismiss is denied."

POINT III.

The District Court Also Has Jurisdiction Under the Provisions of 28 U. S. C. A. 2463 to Hear and Determine the Appellant's Action on Its Merits.

Under this section providing that property detained under revenue laws of the United States shall be subject only to orders and decrees of courts of the United States having jurisdiction thereof, it has been repeatedly held that the District Court has jurisdiction to quash a warrant of distraint such as that involved in the instant case, both upon the ground that the holder of the property levied upon would not be exonerated from personal liability upon acceding to the demand, and upon the ground that the property levied upon belonged to a third party and was being taken to satisfy the taxes of another.

In the case of *United States v. Penn. Mut. Life Ins. Co.,* 130 F. 2d 495, at pages 498-499, the court states:

> "The 'property, or rights to property,' contemplated by Sec. 3710 (now Sec. 6332) are only such as where the holder's payment or transfer thereof to the Collector of Internal Revenue will operate to discharge the holder's liability to the owner." (Parenthetical matter supplied.)

Also, in *United States v. Winnett,* 165 F. 2d 149, at 151, the court in considering a distraint proceeding recognizes that the holder "should not be required to pay the same debt twice even though the interposition here is by the sovereign."

It is submitted that the California laws set forth in the Appendix make it clear that the controller here would be

so liable since the federal statutes involved do not provide that he is exonerated from liability upon complying with the District Director's levy and demand.

The matter is well stated in the *Penn Mutual* case (130 F. 2d 495, *supra*) where it is said:

> "How Congress might render definite an insured's pecuniary interest under a life insurance policy so that the insurer's discharge from its contractual liability would follow from its paying the insured's accrued interest in the policy to the Collector of Internal Revenue on account of a tax delinquency of the insured is neither for us to discuss nor consider. It is sufficient for present purposes that Congress did not act to that end in Sec. 3710 (now Sec. 6332) of the Internal Revenue Code." (Parenthetical matter supplied.)

Moreover, as previously indicated, the controller here has no assurance under the community property laws obtaining in California that Westberg's wages or some portion theerof which were levied upon by the District Director are not the separate property of his wife. It is clear that a delinquent taxpayer's interest in the property levied upon must be determined by State law. (*Cannon v. Nicholas,* 80 F. 2d 934; *Karno-Smith Co. v. Maloney,* 112 F. 2d 690; *United States v. Graham,* 96 Fed. Supp. 318.) The California law clearly provides that a husband and wife by agreement may change community property to the separate property of either. (*Perkins v. Sunset Tel. & Tel. Co.,* 155 Cal. 712; *Ives v. Connacher,* 162 Cal. 174; *Fay v. Fay,* 165 Cal. 469; *Siberell v. Siberell,* 214 Cal. 767; *Rothschild v. Davis,* 217 Cal.

660.) Moreover, the status of property to be acquired in the future as well as that of property presently owned may be fixed by such agreement. (*In re Harris Estate,* 169 Cal. 725; *Rogers v. Rogers,* 86 Cal. App. 2d 817; and *Cheny v. San Francisco Emp. R. System,* 7 Cal. 2d 565, where an agreement was made on the day of marriage as to earnings after marriage.)

Consequently, the mere fact that the controller here is holding wages of Westberg does not of itself give him any assurance that such are necessarily the property of Westberg. Hence, if such wages are in fact the separate property of Westberg's wife the controller would render himself liable to her by complying with the District Director's demand that such monies be turned over for Westberg's delinquent income taxes.

A comparable situation faced the court in *United States v. Stock Yards Bank of Louisville,* 231 F. 2d 628, where at pages 631-632, the court comments:

> "It should be pointed out, however, that distraint is a rough and ready remedy. This short cut form of self-help developed by the common law has been available to the government in pursuit of delinquent taxpayers since the eighteenth century. (cit.) *Where the value and nature of the taxpayer's property are not in question, distraint is no doubt a useful tool in the effective enforcement of the Internal Revenue laws. But it is a blunt instrument, ill-adapted to carve out property interests where their nature and extent are unclear.*
>
> "There is available to the government an alternative remedy well designed to resolve the issues in the

> present case. Under section 3678 of the Internal Revenue Code of 1939 (Compare section 7403 of the present code) the United States can bring suit . . . to enforce a lien . . . and name both the taxpayer and his wife co-defendants. In such a proceeding the extent of the taxpayer's interest . . . can be finally adjudicated, and the rights of all parties fully protected." (Emphasis and parenthetical matter supplied.)

Numerous cases, as may be reasonably expected, have held the federal district court to have jurisdiction to quash warrants of distraint under situations where the value and nature of the taxpayer's interest were unclear. In *Rothensies v. Ullman,* 110 F. 2d 590, the court was held to have such jurisdiction where the property levied upon was a joint bank account held by the husband and wife as tenants by entireties; in *Seattle Ass'n of Credit Men v. United States,* 240 F. 2d 906, the court entertained an action by a trustee for the benefit of unsecured creditors to quiet title to funds on which a District Director had levied for tax claims against an insolvent trustor; and in both *Cannon v. Nicholas,* 80 F. 2d 934, and *Raffaele v. Granger,* 196 F. 2d 674, a wife's action to quash warrants of distraint based upon her interest in the property levied upon were upheld.

Hence, on either of the grounds discussed, the District Court had jurisdiction to entertain the dismissed action.

Conclusion.

For the foregoing reasons it is submitted that the United States District Court committed error in dismissing the appellant's complaint since that court had jurisdiction over the persons of the defendants and of the subject matter of the action. The District Court should be ordered to set aside the order appealed from and to proceed to hear and determine the appellant's action on its merits.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

BOURKE JONES,
Assistant City Attorney,

ALFRED E. ROGERS,
Assistant City Attorney,

T. PAUL MOODY,
Deputy City Attorney,

RALPH J. EUBANK,
Deputy City Attorney,

Attorneys for Appellant.

APPENDIX.

(1) The following provisions of the Charter of the City of Los Angeles govern the payment of wages of municipal employees:

Sec. 374 (Calif. Stats. 1925, p. 1140)—"All public money collected by any officer or employee of the city shall immediately be paid into the city treasury, without any deduction on account of any claim for fees, commissions or any other cause or pretense; and the compensation of any officer, employee or other person so collecting money shall be paid by demands on the treasury, duly audited as other demands are audited and paid."

Sec. 364 (Calif. Stats. 1925, p. 1137)—"The salary or wages of all officers and employees of the city shall be paid either monthly, semi-monthly or weekly, as the Council may by ordinance prescribe. At the expiration of the period fixed in the ordinance providing for the time of payment of such salary or wages, the board, officer or employee having the management or control of any department or office shall cause a payroll to be made out of all persons employed in such department or office during the preceding salary period, stating the amount of compensation of such persons in detail, which said payroll shall be certified as provided in this charter in the case of demands against the city. Each such payroll, duly approved by the Board of Civil Service Commissioners, as in this charter provided, shall be filed with the Controller and shall be accompanied by proper demands or pay checks for the salary or wages of each person specified therein; provided, that nothing in this article contained shall be deemed to affect or limit the provisions of Section 375 of this charter."

Sec. 371 (Calif. Stats. 1925, p. 1139)—"The Controller must keep a record of all demands on the treasury approved by him, or his objections to which have been overruled, showing the number, date, amount, and the name of the payee thereof, on what account allowed, and out of what funds payable, and it shall be a misdemeanor in office for the Controller to deliver any demand with his approval thereon, or otherwise, until this requisite has been complied with."

(2) California Code of Civil Procedure, Section 710, so far as is material to the instant action reads as follows:

* * * * * * * * *

"(a) Whenever a judgment for the payment of money is rendered by any court of this State against a defendant to whom money is owing and unpaid by this State or by any county, city and county, city or municipality, quasi-municipality or public corporation, the judgment creditor may file a duly authenticated abstract or transcript of such judgment together with an affidavit stating the exact amount then due, owing and unpaid thereon and that he desires to avail himself of the provisions of this section in the manner as follows:

* * * * * * * * *

"(2) If such money, wages or salary is owing and unpaid to such judgment debtor by any county, city and county, city or municipality, quasi-municipality or public corporation, said judgment creditor shall file said abstract or transcript and affidavit with the auditor of such county, city and county, city or municipality, quasi-municipality or public corporation (and in case there be no auditor then with the official whose duty corresponds to that of auditor). Thereupon said auditor (or other official) to dis-

charge such claim of such judgment debtor shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due on such claim of such judgment debtor, less an amount equal to one-half the salary or wages owing by the county, city and county, city, municipality, quasi-municipality, or public corporation to the judgment debtor for his personal services to such public body rendered at any time within 30 days next preceding the filing of such abstract or transcript, as will satisfy in full or to the greatest extent the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor.

"(b) The judgment debtor upon filing such abstract or transcript or affidavit shall pay a fee of two dollars and fifty cents ($2.50) to the person or agency with whom the same is filed.

"(c) Whenever a court receives any money hereunder, it shall pay as much thereof as is not exempt from execution under this code to the judgment creditor and the balance thereof, if any, to the judgment debtor.

"(d) In the event the moneys owing to a judgment debtor by any governmental agency mentioned in this section are owing by reason of an award made in a condemnation proceeding brought by the governmental agency, such governmental agency may pay the amount of the award to the clerk of the court in which such condemnation proceeding was tried, and shall file therewith the abstract or transcript or judgment and the affidavit filed with it by the judgment creditor. Such payment into court shall constitute payment of the condemnation award within the meaning of Section 1251 of this code. Upon such payment into court and the filing with the

county clerk of such abstract or transcript of judgment and affidavit, the county clerk shall notify by mail, through their attorneys, if any, all parties interested in said award of the time and place at which the court which tried the condemnation proceeding will determine the conflicting claims to said award. At said time and place the court shall make such determination and order the distribution of the money held by the county clerk in accordance therewith.

"(e) The judgment creditor may state in the affidavit any fact or facts tending to establish the identity of the judgment debtor. No public officer or employee shall be liable for failure to perform any duty imposed by this section unless sufficient information is furnished by the abstract or transcript together with the affidavit to enable him in the exercise of reasonable diligence to ascertain such identity therefrom and from the papers and records on file in the office in which he works. The word "office" as used herein does not include any branch or subordinate office located in a different city.

"(f) Nothing in this section shall authorize the filing of any abstract or transcript and affidavit against any wages, or salary owing to any elective officer of this State whose salary is fixed by Section 19 of Article V of the State Constitution.

"(g) Any fees received by a state agency under this section shall be deposited to the credit of the fund from which payments were, or would be, made on account of a garnishment under this section. For the purpose of this paragraph, payments from the State Pay Roll Revolving Fund shall be deemed payments made from the fund out of which moneys to meet such payments were transferred to said revolving fund."